

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

INTELLIMARK, INC., a Delaware	)	
corporation and IM ACQUISITION,	)	
INC., a Delaware corporation,	)	
Plaintiffs,	)	C.A. No. 05C-01-086-PLA
v.	)	
	)	
PHILIP B. ROWE and LESLIE	)	
ROWE,	)	
Defendants.	)	

Submitted: October 19, 2005  
Decided: October 24, 2005

UPON DEFENDANT'S MOTION TO DISMISS.  
**GRANTED.**

Titania R. Mack, Esquire, Wilmington, Delaware, Attorney for Plaintiffs.

Clark C. Kingery, Esquire, Wilmington, Delaware, Attorney for Defendants.

**ABLEMAN, JUDGE**



Before the Court is a Rule 12(b)(2) Motion to Dismiss for Lack of Jurisdiction over the Person, filed by defendants Philip and Leslie Rowe, seeking dismissal of an action filed by IntelliMark to recover the principal of a loan on which defendants defaulted. As will be set forth more fully hereafter, Plaintiffs' attempt to gain personal jurisdiction over Defendants, solely by virtue of a choice of law clause in the Promissory Note, is insufficient under both Delaware's long arm statute and the Due Process Clause of the United States Constitution. Since Plaintiffs have failed to establish *in personam* jurisdiction over Defendants, the Motion to Dismiss is GRANTED.

### **I. Statement of Facts**

Defendants Philip and Leslie Rowe (the "Rowes" or "Defendants"), both residents of California, signed a promissory note for \$200,000 to Plaintiff IntelliMark, a Delaware corporation with its principal place of business in Little Rock, Arkansas. The loan was secured by 3,333 shares of stock in Plaintiffs' corporation. Plaintiffs believe these shares, owned by Defendants, are worth only a negligible amount of the outstanding debt.

The contract was negotiated and executed exclusively in California, but contained a choice of law clause, designating the laws of Delaware as controlling the interpretation of the contractual terms. The Rowes' only



other contact with Delaware appears to have been that Mr. Rowe was a director of IntelliMark.<sup>1</sup>

## **II. Discussion**

Defendants' motion seeks to have this cause of action dismissed pursuant to Superior Court Civil Rule 12(b)(2), on the ground that the exercise of jurisdiction over them is improper because they have had no contacts with the State of Delaware.

A plaintiff bears the burden of establishing a basis for jurisdiction over a non-resident defendant.<sup>2</sup> In determining whether a plaintiff satisfies this burden, Delaware courts apply a two-step analysis.<sup>3</sup> First, the Court considers whether jurisdiction is appropriate under Delaware's long arm statute, and second, whether asserting such jurisdiction would offend the Due Process Clause of the United States Constitution (the so-called "minimum contacts" requirement).<sup>4</sup> In making this determination, the Court must view all factual disputes in a light most favorable to plaintiff.<sup>5</sup>

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<sup>1</sup> The Court notes that this fact is not contained in the pleadings. Plaintiffs' complaint describes Mr. Rowe as a "former employee." However, because facts must be construed in favor of the Plaintiff and this particular fact is not determinative of the motion, the Court will analyze the motion making the assumption that Mr. Rowe was an officer of IntelliMark.

<sup>2</sup> *Aeroglobal Capital Mgmt. v. Cirrus Indus.*, 871 A.2d 428, 437 (Del. 2005); *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984).

<sup>3</sup> *Aeroglobal*, 871 A.2d at 437; *Boone v. Oy Partek AB*, 724 A.2d 1150 (Del. Super. Ct. 1997) *aff'd* 707 A.2d 765 (Del. 1998).

<sup>4</sup> *Waters v. Deutz Corp.*, 479 A.2d 273 (Del. 1984).

<sup>5</sup> *Boone*, 725 A.2d at 1155.



### A. Delaware's Long Arm Statute

Plaintiffs argue that Defendants' signatures on the promissory note, which contains a choice of law clause, constitutes "transacting business" within the meaning of Delaware's long arm statute. 10 *Del. C.* § 3104(c)(1) gives this Court personal jurisdiction over any nonresident who "transacts any business or performs any character of work or service in the State."<sup>6</sup> In order for this Court to exercise jurisdiction under subsection (c)(1), some act must have occurred within the State.<sup>7</sup> A person's status as president, stockholder or employee of a Delaware corporation is not sufficient, without more, to establish jurisdiction.<sup>8</sup> For example, in *Kelly v. McKesson HBOC, Inc.*,<sup>9</sup> this Court held that the mere signing of a Registration Statement in California on behalf of a Delaware corporation is insufficient to constitute transacting business within the State within the meaning of subsection (c)(1).

In this case, Plaintiffs contend that the Rowses' signatures on the promissory note, which contains a choice of law provision designating Delaware as the state whose law shall govern its interpretation, is sufficient to constitute transacting business within the State. Plaintiffs point to the Delaware Supreme Court's consideration of a choice of law provision for jurisdictional purposes in *Aeroglobal Capital Management*,

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<sup>6</sup> 10 *Del. C.* § 3104(c)(1).

<sup>7</sup> *Kelly v. McKesson HBOC, Inc.*, 2002 WL 33939 (Del. Super. Ct.) (citing *Tristrata Technology Inc. v. Neoteric Cosmetics, Inc.*, 961 F.Supp. 686 (D.Del. 1997)).

<sup>8</sup> *Id.*

<sup>9</sup> 2002 WL 33939 (Del. Super. Ct.).



*LLC v. Cirrus Industries, Inc.*<sup>10</sup> The choice of law clause in *Aeroglobal*, however, was merely one of several factors that the Delaware Supreme Court used in determining *in personam* jurisdiction in that case. In addition to the choice of law clause, *Aeroglobal* involved a foreign corporation that created a wholly-owned Delaware subsidiary for the express purpose of facilitating actions within the State of Delaware.<sup>11</sup> In the case at bar, Defendants neither acted nor effected actions within the State of Delaware.

Plaintiffs also rely heavily on the expansive language of the District Court for the Northern District of Illinois in *Ronco, Inc. v. Plastics, Inc.*<sup>12</sup> to argue that signing a contract containing a choice of law clause constitutes transacting business within the jurisdiction designated by the clause.<sup>13</sup> The court in *Ronco* wrote: “By choosing to apply Illinois law to this transaction, defendants sought to invoke the protections and benefits of the law of Illinois... When a defendant voluntarily invokes the benefits and protections of Illinois law, he transacts business in Illinois within the meaning of the [long arm] statute.”<sup>14</sup> While this language appears to grant jurisdiction, by virtue of a choice of law clause alone, the Court in *Ronco* also noted that the nonresident defendant negotiated

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<sup>10</sup> 871 A.2d 428 (Del. 2005).

<sup>11</sup> *Aeroglobal*, 871 A.2d at 439-40.

<sup>12</sup> 539 F. Supp. 391 (N.D. Ill. 1982).

<sup>13</sup> Plaintiffs argue that the holding in *Ronco* should be followed because Delaware’s long-arm statute is derived from the Illinois long-arm statute. *Waters v. Deutz Corp.*, 460 A.2d 1332 (Del. Super. Ct. 1983). This Court has previously held that where a statute is adopted from a foreign state, the Legislature also intended to adopt the foreign judicial construction of the statute to aid interpretation. *Id.*; *Stauffer v. Standard Brands Incorp.*, 178 A.2d 311 (Del. Ch. 1962), *aff’d* 187 A.2d 78 (Del. 1962).

<sup>14</sup> *Ronco Inc. v. Plastics, Inc.* 539 F. Supp. 391, 396 (N.D. Ill. 1982).



the contract in question in Illinois, and shipped a substantial volume of products to that state, thereby unquestionably transacting business within the meaning of the long-arm statute.<sup>15</sup> Thus, although Plaintiffs argue that the *Ronco* holding is strongly persuasive authority,<sup>16</sup> the Illinois Court in that case did not grant jurisdiction over a non-resident defendant solely on the basis of a choice of law provision.

There is no evidence, and Plaintiffs do not plead, that there were any actions by Defendants, other than signing the promissory note (which took place in California), that could possibly be construed as transacting business, or even acting, within the State of Delaware. Because the Rowses did not have any contacts in Delaware, there is no basis under the long-arm statute to confer personal jurisdiction simply on the basis of a choice of law provision in a promissory note. The Court finds that the Plaintiffs have failed to establish business transactions or actions in Delaware sufficient to subject Defendants to personal jurisdiction under 10 *Del. C.* § 3104(c)(1).

#### B. The Due Process Clause

Plaintiffs' attempt to gain personal jurisdiction also fails under the Due Process Clause of the Fourteenth Amendment as Plaintiffs have failed to establish even minimum contacts between Defendants and Delaware. Plaintiffs maintain that the execution of the promissory note containing a choice of Delaware law provision was a purposeful and

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<sup>15</sup> *Id.* at 395-97.

<sup>16</sup> See footnote 13 *supra*.



deliberate direction of activities toward the State of Delaware by Defendants, and demonstrates that Defendants have purposely invoked the benefits and protections of Delaware's laws. Plaintiffs submit, therefore, that Defendants have minimum contacts with the State of Delaware and that the exercise of jurisdiction over them is proper under the Due Process Clause. Plaintiffs additionally argue that Defendants could reasonably expect to be haled into court in Delaware due to Mr. Rowe's association with Plaintiffs as a director of IntelliMark, a fact not set forth in the complaint.

The Due Process Clause of the Fourteenth Amendment permits the exercise of personal jurisdiction over a nonresident defendant when that defendant has purposefully invoked the benefits and protections of a State's laws, and the exercise of that jurisdiction does not offend "traditional notions of fair play and substantial justice."<sup>17</sup> Due process also requires that the defendant's conduct in connection with the forum state be such that a defendant "should reasonably anticipate being haled into court" in the forum state.<sup>18</sup> This fair warning requirement is satisfied if the defendant has "purposefully directed" his activities toward residents of the forum state<sup>19</sup> and the litigation arises out of or relates to those activities.<sup>20</sup>

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<sup>17</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>18</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>19</sup> *Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984).

<sup>20</sup> *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).



Plaintiffs rely on *Burger King Corp. v. Rudzewicz*<sup>21</sup> as authority for their contention that Defendants deliberately affiliated themselves with this State by executing the promissory note containing the choice of law provision, and that they should therefore be subject to personal jurisdiction here. The United States Supreme Court, in *Burger King*, addressed this same claim, however, by noting that, while a choice of law provision should not be ignored in a jurisdictional analysis, standing alone it is insufficient to confer jurisdiction.<sup>22</sup>

In the case at bar, Plaintiffs present the Court with no evidence that Defendants have purposely directed their activities into Delaware, or transacted any business here, other than that Mr. Rowe was a director of IntelliMark, a fact not set forth in the pleadings but argued in Plaintiffs' brief. It is established that ownership or control of a Delaware corporation is not sufficient to constitute substantial activities in a forum.<sup>23</sup> In *Aeroglobal*, the Delaware Supreme Court noted that, while ownership of a Delaware corporation or subsidiary is generally insufficient to establish personal jurisdiction, it may constitute the transaction of business within the State where the underlying cause of action arises from the creation and operation of a Delaware corporation for the express purpose of acting within the State.<sup>24</sup> In this case, however, Plaintiffs allege no actions on behalf of Defendants other than

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<sup>21</sup> 471 U.S. 462 (1985).

<sup>22</sup> *Id.* at 482.

<sup>23</sup> *Schaffer v. Heitner*, 433 U.S. 186, 213 (1977).

<sup>24</sup> *Aeroglobal*, 871 A.2d at 439-40.



an ownership interest in IntelliMark. Therefore, IntelliMark has failed to show that Defendants have the requisite contacts with Delaware to satisfy the “traditional notions of fair play and substantial justice” required by due process.

### **III. Conclusion**

For all of the foregoing reasons, this Court determines, as a matter of law, that Plaintiffs cannot obtain personal jurisdiction over Defendants. Plaintiffs have failed to establish that Defendants have acted to transact business within the meaning of Delaware’s long arm statute. Plaintiffs have likewise failed to show activities sufficient to establish minimum contacts with the State in order to satisfy the requirements of the Due Process Clause.

Accordingly, Defendant’s Motion to Dismiss is hereby GRANTED.

**IT IS SO ORDERED.**

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**PEGGY L. ABLEMAN, JUDGE**

Original to Prothonotary – Civil  
cc: Titania R. Mack, Esquire  
Clark C. Kingery, Esquire